

**IN THE
SUPREME COURT OF THE UNITED STATES**

October Term, 1978

No. 78-1397

ALVIN F. MALLERY, JR.
Petitioner

versus

FRANK BLACKBURN, In
His Capacity as Warden,
Respondent

**PETITION FOR WRIT OF
CERTIORARI TO THE
SUPREME COURT OF LOUISIANA**

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FRANK BLACKBURN, etc.
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PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF LOUISIANA

The petitioner Alvin F. Mallery, Jr.,
respectfully prays that a writ of
Certiorari issue to review the judgment and
opinion of the Supreme Court of Louisiana
entered in this proceeding on November 13,
1978.

OPINION BELOW

The opinion of the Supreme Court of Louisiana, which appears in the appendix hereto, infra, is reported at 364 So.2d 1283 (1978).

JURISDICTION

The judgment of the Supreme Court of Louisiana, denying petitioner relief from the life sentence, was entered on November 13, 1978. A petition for rehearing, timely made, was denied on December 14, 1978.

This Petition for Certiorari is being docketed in this Court within 90 days from the denial of rehearing below. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Whether La. Rev. Stat. 40:966B(1), requiring the mandatory imposition of life imprisonment for the crime of distribution of heroin, is violative of the cruel and unusual punishment clause of the Eighth Amendment to the United States Constitution on account of its mandatory application to all offenders convicted of this offense as

well as on account of its resulting excessiveness when applied to this offender under the mitigating factors present in this case.

CONSTITUTIONAL PROVISIONS AND STATUTES

Eighth Amendment, U.S. Constitution:

"Excessive bail shall not be required,
*** nor cruel and unusual punishments
inflicted."

La. Rev. Statute 40:966B(1):

"[U]pon conviction [a violator] shall
be sentenced to life imprisonment at hard
labor * * *."

STATEMENT OF THE CASE

The petitioner, Alvin F. Mallery, Jr., was originally tried by jury and found guilty of the offense of distributing heroin. The sentencing judge, in accordance with statutory law, imposed the mandatory sentence of life imprisonment on petitioner.

An appeal was perfected to the Supreme Court of Louisiana which affirmed

the conviction without written opinion at 347 So.2d 847 (La. 1977). Thereafter, he filed an application for a writ of habeas corpus contending that the sentence was unconstitutional.

The district court rejected the claim and, pursuant to Louisiana procedure, Mallery sought a Writ of Certiorari to the Supreme Court of Louisiana. The Court granted certiorari, but ultimately affirmed the district court's ruling, thereby maintaining the life sentence. The vote of the Court was a three man majority with two others concurring and two dissenting.

Mallery then caused to be filed a timely Petition for a Writ of Certiorari in this Court.

FACTS

The underlying facts are essentially undisputed. Mallery was 25 years old at the time of the offense. He was an addict who was receiving methadone treatment, but nevertheless continued his habit. He was approached by a fellow addict, who was

working for the police. This fellow addict appeared to be in withdrawal and begged Mallery to secure heroin for him. Mallery agreed and obtained eight doses for the police agent for which he received two doses to supply his habit.

Prior to this offense, Mallery had no previous criminal record. His suppliers who were observed by the police were never pursued.

Nevertheless, upon his conviction the sentencing judge was required to impose the only sentence available, that is life imprisonment. Mallery continues to serve this sentence at the Louisiana State Penitentiary at Angola, Louisiana.

REASONS FOR GRANTING THE WRIT

The sentence of life imprisonment is the penultimate punishment. Hart v Coiner, 483 F.2d 136 (CA4, 1973). As this Court has regulated the application of the imposition of the ultimate, death penalties, more legislatures are resorting to the imposition of this punishment.

In the end, it is this Court's task to determine whether and when such a penalty may be unconstitutional. The life sentence, under these facts and in this case, has two vices which render it violative of the Eighth Amendment. The two defects, drawn from the death penalty decisions, are, first, the mandatoriness of the imposition of the sentence and, second, the excessiveness of the imposed sentence.

Under the Louisiana statutory scheme, a sentencing judge has polar alternatives in a case involving distribution of heroin. He may, on the one hand, impose on the offender the statutorily mandated sentence of life imprisonment and order that the offender serve the entire sentence. La. R. S. 40:966 B(1). On the other hand, exercising his only other option, he may impose the sentence of life imprisonment and suspend the execution of it. Art. 895 B, Louisiana Code of Criminal Procedure. If he exercises his second option, he cannot require the offender to serve more than one (1) year in prison.

Louisiana has determinate sentencing. Art. 879, La. Code of Criminal Procedure. Further, under state law once a lawful sentence has been imposed and the execution of it commenced, no court may change it. Art. 881, La. Code of Criminal Procedure. The only manner in which a life sentence can be reduced is through executive intervention.

Regardless of which alternative the sentencing judge makes, he must impose the life sentence. But, more critical to this inquiry, is that under this scheme, the court is given "no meaningful opportunity" to consider the particular crime and the individual offender. Roberts v Louisiana, 428 U.S. 337, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976). The range of years greater than one and less than natural life is excised from the sentencing judge's purview as a possible sentence.

Such a mandatory sentence results in the treatment of the offenders "as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty

* * *." Woodson v North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). Indeed, Mr. Justice Tate of the Supreme Court of Louisiana observed in a concurring opinion: "The present is just one of the score or so of life sentences we have in the present month affirmed for the distribution offense." State of La. vs. Terrebonne, 354 So.2d 1356 (La. 1978).

The vice of the mandatory sentence is that it provides no method of "particularizing" the punishment. The statutory inability to particularize the sentence in a meaningful way is a "constitutional shortcoming." Woodson, supra.

Under this scheme Mallery is indistinguishable from a professional, profiteering distributor of heroin. He is indistinguishable from a career criminal who has been convicted of violating the law on previous occasions. He is indistinguishable from one who acted, not out of sympathy or need, but out of contempt and greed.

The State of Louisiana is challenged to provide this Court with a single instance of a person convicted of heroin distribution who received the suspended sentence but did not co-operate with the police. Clearly, in Louisiana the absence of meaningful sentencing discretion in these cases results in an unconstitutional sentence.

The second constitutional defect is found in the length of this sentence to the facts of this case. Unquestionably, in the external or objective forum, petitioner is guilty of the crime of distribution of heroin. His legal guilt is the same as the profiteering distributor.

Yet, the punishment for a single transaction, for which petitioner received two doses of heroin to supply his own addiction, of life imprisonment is excessive.

In only six other states is the sentence of life imprisonment even available for this offense. Each of those either has indeterminate

sentencing (e.g., New York) or there is a comprehensive range of sentences (e.g., Missouri). In at least one state, Rhode Island, an addict, like Mallery, could not receive the penalty of life imprisonment, even though such a penalty is available for the non-addict/distributors. (R. I. Stat. 21-28-4.01).

The maximum penalty under the laws of the United States for this very same offense is 15 years, which itself is discretionary.

An excessive punishment is unconstitutional. Gregg v Ga., 428 U.S. 174, 96 S.Ct. 2909. A punishment is excessive when it is unnecessary. Furman v. Ga., 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

Excluding from consideration those states which permit the life sentence, the following can be said, concerning the balance of the states' maximum allowable punishment for this offense: the mean average is 18.5 years; the median is 15 years. 15 years and

20 years are bi-modal numbers. Again, all of these are either discretionary maximum or the maximum in an indeterminate sentencing scheme.

Thus, in no other state in the union, would this offense require such a harsh penalty. No other legislature in a determinate sentencing state has found it necessary to mandate such a penalty for all distributors, regardless of the level of criminal involvement. Congress does not consider the life sentence necessary in any distribution case.

Under Louisiana's statutory scheme, the minor, addict distributor of heroin is required to be punished more severely than the armed robber (La. R. S. 14:64 - 99 years), the forcible rapist (R. S. 14:43.1 - 40 years), the aggravated arsonist (R. S. 14:51 - 20 years), and the aggravated burglar (R. S. 14:60 - 30 years), all persons who potentially use violence against the bodily integrity of another person. All these maximum sentences are discretionary.

More telling is that petitioner is punished exactly the same as the second-degree murderer (R. S. 14:30.1) and the aggravated kidnapper (R. S. 14:44), both persons who, in fact, do violence to their victims.

This is the evidence of disparity of treatment; the Louisiana punishment is inappropriate for petitioner's crime.

The severe punishment imposed upon Mallery should be set aside. It is unnecessary to achieve any purposeful societal aim other than to satisfy the "more is better" syndrome.

CONCLUSION

Mallery is not alone. Hundreds of others are imprisoned in Louisiana as a result of the blind imposition of this penalty. Unless this Court intervenes to require the application of sentencing principles to the case at bar, hundreds and, eventually, thousands shall be

imprisoned under this law and its successor (which has abolished even the theoretical possibility of the sentencing judge to suspend the life sentence).

Of those numbers many, if not most, will be the periphery of narcotics traffickers. As was noted by the justices of the Louisiana Supreme Court in this case, and two companion cases decided that same date, the major distributors in each of these cases were never pursued by the police. It was only the peddling addict who was arrested and sentenced to life. (See State of La. v Terrebonne, 364 So.2d 1290 (La. 1978) and State of La. v Sykes, 364 So.2d 1293 (La. 1978).

Here this Court has the opportunity to apply the holdings of the death penalty cases to this next-to-death punishment.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Louisiana

Respectfully submitted,

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CERTIFICATE

I certify that a copy of the foregoing petition has been mailed to the Attorney General of Louisiana and to the District Attorney of the Parish of Orleans.

JOHN J. LEE, JR.

A P P E N D I X

STATE of Louisiana

vs

Alvin F. MALLERY, Jr.

No. 62542

Supreme Court of Louisiana

Nov. 13, 1978

Rehearing Denied Dec. 14, 1978

SUMMERS, Justice.

Alvin F. Mallery was indicted by the Orleans Parish Grand Jury for the April 28, 1976 distribution of heroin, a crime punishable at that time by a statute which mandated "life imprisonment at hard labor and, in addition, (the offender) may be required to pay a fine of not more than fifteen thousand dollars." La.Rev.Stat. 40:966. See Act 207 of 1973. The penalty provision was later amended by Act 631 of 1977 to add "without benefit of probation or suspension of sentence." Consideration

of this case will therefore involve the statute as it existed at the time of the offense, prior to the 1977 amendment.

Mallery was represented by retained counsel. He was tried by a jury, found guilty as charged and sentenced to life imprisonment at hard labor. On appeal the conviction was affirmed on July 1, 1977. State v. Mallery, 347 So.2d 847 (La.1977).

An application to the district court for a writ of habeas corpus was filed on May 11, 1978. After a hearing on the motion it was denied. Mallery's application to Court for review of the trial court ruling was granted on July 3, 1978. Although the application for habeas corpus was based upon the contentions that Mallery had ineffective counsel at trial and that the mandatory penalty of life imprisonment was excessive, certiorari was granted principally to consider the claim that the sentence im-

posed was excessive.

The trial judge was without discretion in sentencing Mallery. The statute's mandate required the sentence imposed. However, it was not and is not mandated by Louisiana law in this case that Mallery serve a life sentence, he could have received probation and a suspended sentence. La.Rev.Stat. 40:966; La.Code Crim.Pro. art. 893. Moreover he continues to be eligible for commutation of sentence and parole. La.Rev.Stat. 15:574.4.

In order to grant Mallery the relief he seeks the mandatory life sentence provision of the statute must be declared repugnant to the requirement of Section 20 of Article I of the Louisiana Constitution which declares that "No law shall subject any person to euthanasia, to torture, or to cruel, excessive, or unusual punishment," or to the proscription against the infliction of "cruel and unusual punishments"

embodied in the Eighth Amendment to the United States Constitution.

Research fails to disclose that the United States Supreme Court has ever declared life imprisonment as such unconstitutional. Nor has this Court ever decided that life imprisonment was cruel and unusual punishment whenever imposed. To the contrary, on at least three occasions in written opinions in which the law and facts were adduced, the constitutionality of this penal clause has been upheld. State v. Hopkins, 351 so.2d 474 (La.1977); State v. Whitehurst, 319 so.2d 907 (La.1975) and State v. Stetson, 317 So.2d 172 (La.1975). Today in State v. Terrebonne, 364 So.2d 1290, this Court again upholds the statute against an attack that it offends the Louisiana Constitution's prohibition against cruel, excessive, and unusual punishments. The law and reasons contained in that opinion

are equally applicable to the case at bar. The federal courts have also upheld the constitutionality of the statute. See, e.g., La. Affiliate of NORML v. Guste, 380 F.Supp. 404 (E.D. LA.1974); affirmed, 511 F.2d 1400 (5th Cir.1975); cert.denied 423 U.S. 867, 96 S.Ct.129, 46 L.Ed.2d 96 (1975).

As we understand Mallery's contention, he takes the position that the penalty provision of the statute is excessive as applied in this case because he had no previous convictions, he was not quite twenty-six years old and at the time of the offense he was a heroin addict being treated at a New Orleans Methadone Clinic. Even if these facts are accepted as established the contention is without merit.

A principal argument of the defense based on these facts is that the mandatory character of the sentence leaves no room to individualize the punishment. Justice,

the defense argues, unless individualized is not justice at all. This argument overlooks the broad statutory standards in which probation, suspended sentences, commutation and parole are permissible in this case. All of these enactments are designed to "individualize" the punishment to the crime.

According to the defense a guarantee that the sentence be proportioned to the offense is to be found in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). Such a proposition is in the first instance a matter which falls squarely within the constitutional prerogative of the Legislature. Except as limited by the constitution its authority is plenary. Its determination is clothed with a presumption of constitutionality which persists until a finding is made, supported by adequate evidence, that the enactment prescribing punishment has transcended the limitation

on legislative power set forth in constitutional enactments of equal or superior dignity. La. Const. arts. I, II, III & V; La.Civil Code art. 1.

It is a matter of common knowledge, and it is a fact, that social conditions in this state are adversely affected by the pervading traffic in and use of drugs. This condition is a serious menace to good social order, which law seeks to protect and maintain. La.Rev.Stat. 15:422. In light of these conditions the facts relied upon by the defense do not demonstrate that the legislative wisdom expressed in the contested statute violates any constitutional limitation on its power, particularly that which proscribes cruel and unusual punishment.

It is no defense to this prosecution that distribution of drugs is not a violent crime and consequently punishment for this offense should not be on a par with second-

degree murder and aggravated kidnapping. Assuming the punishments are equal, traffic in narcotics is an insidious crime which, although not necessarily violent, is surely as grave. Indeed, the effect upon society of drug traffic is pernicious and far-reaching. For each transaction in drugs breeds another and in the case of heroin the degeneracy of the victim is virtually irreversible. Compared to the effect of drug traffic on society, isolated violent crimes may well be considered the lesser of the two evils.

And, as a reference to our decision today in State v. Terrebonne, will demonstrate, Louisiana is not unique in its determination to stem the tide of drug abuse to the extent which serious penalties may deter. Comparable legislation has been enacted in at least six other states.

For the reasons assigned, the ruling of the trial judge is affirmed.

DIXON, J., concurs.

CALOGERO, J., concurs for reasons assigned in State v. Terrebonne, La., 364 so.2d 1290, decided this date.

TATE, J., dissents and assigns reasons.

DENNIS, J., dissents for the reasons assigned by TATE, J.

TATE, Justice, dissenting.

The defendant was convicted of distribution of heroin and sentenced to life imprisonment, as mandated by statute. La.R.S. 40:966 (1973).¹
His conviction was affirmed

upon appeal. 347 So.2d 847 (La.1977).

Upon his post-conviction application, we granted certiorari, 360 so.2d 875 (1978), primarily to review his contention that the life sentence imposed was unconstitutionally excessive, in violation of the Eighth Amendment to the United States Constitution and also, especially, of the prohibition against "cruel, excessive, or unusual punishment" provided by Article 1, Section 20 of the Louisiana Constitution of 1974.

I dissent from our majority holding that the sentence in this case was not excessive as defined by constitutional standards. Before stating the legal principles applicable, it may be well to note the facts in the instant case, as reflected by the post-conviction hearing and by the record in the applicant's direct appeal, our docket number 59,331.

1.

The applicant was a young man of 25, without previous criminal record or arrest. He was a plumber by trade, with a wife and three children. About three years before the incident, he had become a heroin addict. A year later, he entered a methadone program to break his addiction, and he had been able to reduce his previous use of six bags of heroin a day. Nevertheless, at the time of the offense, he still used heroin intermittently, about two bags a day.

The particular transaction at issue occurred as follows, according to the police witnesses for the state:

Narcotics agents were informed by "Sunny," a confidential informant, that a drug buy would take place. An officer went with Sunny, met with the defendant, and agreed with the latter to buy some heroin. The defendant made a telephone call from a public pay station. They then went to

another location, where the defendant met a woman, apparently transferred the officer's \$150 to her for ten bags of heroin, turned eight of them over to an undercover police officer, and received two of them for his help in arranging the transaction.

About a month later the accused was arrested for the distribution offense. The woman (wholesaler) from whom he obtained the drugs was never charged, nor was anyone else except the defendant.

The defendant denied various details of the transaction, but he admitted he had helped arrange for the purchase. According to him, Sunny (the police informant) had come to his home, complaining of withdrawal symptoms, and had asked for help in locating some drugs. The defendant told Sunny he was not sure if he could help, but he telephoned someone named "Man," and Sunny and he drove to a location where Sunny met a

third man (the undercover police agent) and the defendant met Man. (According to the defendant, Man handled all further participation in the transaction, including obtaining the drugs from the lady after Man had made a telephone call.)

The purchasers gave the defendant two bags of heroin for his help, for his personal use.

Under these facts, the defendant was undoubtedly guilty of the offense of distribution of heroin. Although he was motivated by sympathy for a fellow-addict's needs and by his own addiction, according to him, nevertheless this does not exculpate him from guilt.

Nor (under presently accepted standards of entrapment) does the circumstance that the crime was instigated and set up by an addict-informer, possibly to justify his own continued employment as an informer

and his own continued immunity from arrest and prosecution as a heroin possessor, lessen the defendant's legal guilt of the crime. And it is further irrelevant to the accused's guilt that he is punished for what under the record is a one-time participation in a distribution, whereas apparently the wholesalers for whom he was an intermediary were not pursued or prosecuted.

In my opinion, what these attenuating circumstances do suggest, irrelevant as they may be to the defendant's legal guilt of the crime charged, is that the mandatory life sentence is excessive for this single non-professional distribution by this otherwise law-abiding (except for his heroin-use) addict.

II.

I concede that great deference must be given to the legislative determination of the appropriate penalty and that, in view

of the enormous social evil at stake, severe penalties may undoubtedly be appropriate for those engaging in heroin traffic for gain. I further concede that a life sentence for a commercial distributor of heroin in large quantities might not be excessive.

What I do suggest, however, is that a mandatory life sentence for a person for a single act of distribution of heroin, however small or insignificant the amount of the drug or the offender's participation, is excessive under accepted constitutional standards. If so, the courts in the performance of their constitutional function cannot blindly defer to the legislative characterization, when to do so offends the constitutional prohibition against excessive punishment of individuals for transgressions. It is the very function and duty of the courts to enforce consti-

tutional protections of individuals against governmental excesses prohibited by our constitutions, however popular with the majority of the moment may be its government's action against these individuals, and however despised the latter may be by the majority at the time.

In determining what is excessive punishment under the federal Eighth Amendment's prohibition against cruel and unusual punishment, the federal courts have adopted a standard that a sentence is excessive when it is grossly out of proportion to the severity of the crime. Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977); Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); Rummel v. Estelle, 568 F.2d 1193 (C.A.5, 1978); Downey v. Perini, 518 F.2d 1288 (A.A.6, 1975); Hart v. Coiner, 438 F.2d 136 (C.A.4, 1973), certiorari denied 415 U.S. 983, 94

S.Ct. 1577, 39 L.Ed.2d 881 (1974). Unconstitutional excessiveness may also result from the automatic imposition of a harsh penalty for all transgressions whatever the circumstances of the crime or the background of the individual offender. Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976).

Thus, recognizing these principles, the federal courts in Rummel and Hart, cited above, set aside, as unconstitutional, statutorily mandated life sentences imposed upon multiple offenders, when grossly disproportionate to the underlying crimes upon which the convictions were based. Although the statutes themselves were not declared facially unconstitutional and whenever applied,² they were declared unconstitutional insofar as applied to require the imposition of mandatory life sentences when grossly disproportionate to

the underlying offenses of the particular offender. Nor does the availability of parole as a matter of administrative grace save from unconstitutionality a sentence excessive as grossly disproportionate to the crime charged. Rummel at 568 F.2d 1196.

The Downey decision, above cited, for similar reasons held to be unconstitutionally excessive mandatory minimum sentences of 10-20 years for possession of marijuana and 20-40 years for sale of marijuana, when applied to a first offender.³ On the other hand, the United States Second Circuit upheld the constitutionality of mandatory sentences of 4 years to life and of 6 years to life for the sale of cocaine, and for the possession of cocaine with intent to distribute it, respectively; partly because of the recognized probability of parole under the New York statute

involved. Carmona v. Ward, 576 F.2d 405 (C.A.2, 1978).⁴

Other state high courts have also invalidated mandatory sentences as disproportionate to the gravity of the offense and as violating state and federal constitutional prohibitions against cruel and unusual punishment.

The California Supreme Court found that punishment relating to drugs other than marijuana, when it precluded parole for a minimum period of ten years as to an offender with prior drug convictions without regard to mitigating circumstances, constituted cruel and unusual punishment in violation of its state constitution. A test similar to Carmona and Hart was applied: an examination of the nature of the offense and the offender, an examination of other punishments for more serious crimes in California, and an examination

of other jurisdictions. In re Foss, 10 Cal.3d 910, 112 Cal.Rptr. 649, 519 P.2d 1073 (1974); see also In re Lynch, 8 Cal.3d 410, 105 Cal.Rptr. 217, 503 P.2d 932 (1972).

In People v. Lorentzen, 387 Mich. 167, 194 N.W.2d 827 (1972) (20 years mandatory minimum sentence for selling marijuana), the Michigan Supreme Court employed a broader test. Besides comparing other statutes, the court determined whether any of the valid goals sought to be achieved by the imposition of the punishment is served by the sentence imposed and found the mandatory penalty excessive. The court remanded the case for re-sentencing to a lesser penalty.

III.

The jurisprudence on proportionality uses several criteria to determine if a penalty imposed by the legislature is cruel

and unusual under the federal Eighth Amendment. These include the nature of the offense and the legislative purpose behind the statutory punishment, an examination of the offender, a comparison of how the defendant would be punished in other jurisdictions, a comparison of punishments in the same jurisdiction for other offenses.

Examining these criteria with reference to La.R.S. 40:966 B(1) (1973):

1. The nature of the offense: Unquestionably, for reasons stated by the majority, a life sentence for the distribution of heroin is not excessive under all circumstances. The commercial distribution of heroin is vicious social evil, in the degradation of human lives and in the other crimes spawned by its addicts who acquire the addiction. Undoubtedly, severe penalties are justified by the

legislative purpose to deter similar offenses and to punish such perpetrators of serious social evil.

2. The particular offender and his participation in the offense: Despite the seriousness of the offense, however, a mandatory all-inclusive sentence may be unconstitutionally excessive insofar as applied to a particular offender, when imposed without a rational gradation of his culpability as compared to the more serious offenders punishable by the statute.

Thus, the California Supreme Court stated in In re Foss, cited above at 112 Cal.Rptr. 655, 519 P.2d 1079: "Heroin is an opiate based drug which causes a strong psychological and physiological addiction, or drug dependence, through continued use. We have no doubt that heroin abuse presents a serious problem

to our society or that harsh penalties may be necessary to restrict the supply, sale and distribution of this substance. In enacting additional penalties for repeated offenses, however, consideration should be given to the particular circumstances of the offenses committed, such as the quantity of narcotics involved, and whether the transactions were those of an addict to support his habit, as is the case here, or were sales for profit made by other suppliers of heroin."

The Louisiana statute here at issue imposes the same punishment of life imprisonment "regardless of the circumstances of the crime or of the offender, or of the degree of guilt as a retailer or wholesaler or mere giver of drugs, however large or small in quantity." *State v. Terrebonne*, 354 So.2d 1356, 1357 (La.1978) (concurring opinion).

Here, accepting for the moment the showing in the record,⁵ we have a first offender, never before arrested, who was an addict and who had engaged in the distribution of heroin only as an isolated offense. Rather, solicited by a governmental agent who pretended to be another addict in need, the defendant helped him obtain some heroin--to satisfy the addict's need, as well as (from his tip for performing the service) his own need of the deadly drug. The record also seems to indicate that he had never before been engaged in or even been suspected of participating in a drug sale.

(Rather surprisingly, as in *State v. Sykes*, 364 So.2d 1293, decided on rehearing this date, no attempt was made by the several governmental agents on the scene to apprehend/prosecute the wholesaler or retailer who actually supplied the drugs,

or whom the present addict served only as an ad hoc conduit.)

3. A comparison of other states' penalties for drug-related offenses shows that the Louisiana penalty is the most severe. Only the New York law provides for a mandatory life sentence, but even that is of an indeterminate nature of four (or six) years to life; and (unlike in Louisiana) even that life sentence may not be applicable if only a small amount of the drug is involved. The other states provide for maximum terms of ten years, fifteen years, twenty years, or permit the sentencing judge to establish a maximum sentence of any length up to life but do not require it. Note, "Drug Abuse, Law Abuse, and the Eighth Amendment," 60 Cornell L.Rev. 638, 665-668 (1975). See also footnote 4.

4. A comparison of other crimes in

Louisiana and their punishments shows that the penalty of R.S. 40:966B is one of the most severe.

First degree murder (La.R.S. 14:30), second degree murder (La.R.S. 14:30.1), and aggravated rape (La.R.S. 14:42) have mandatory sentences of life imprisonment at hard labor without benefit of parole, probation or suspension. (La.R.S. 14:30.1 grants parole power after forty years.) Aggravated kidnapping (La.R.S. 14:44) imposes a penalty of life imprisonment if the victim is liberated prior to imposition of sentencing.

A person convicted of armed robbery (La.R.S. 14:64) can receive a sentence of 5-99 years of hard labor without parole, probation or suspension. Other violent crimes do not impose a life sentence: See, e.g., La.R.S. 14:31, manslaughter--21 years; La.R.S. 14:51, aggravated arson--5-20 years;

La.R.S. 14:60, aggravated burglary--1-30 years.

It thus appears that the mandatory life sentence for the distribution of heroin, however small in quantity or amateur the participant, is unusually severe compared with the statutory penalties for violations of other crimes in Louisiana.

Summary: Measured by all these criteria except the first, the life sentence here imposed is grossly disproportionate to the particular offense and offender here involved. While the first criteria (the nature of the crime and the legislative purpose) undoubtedly justifies a severe penalty for deterrence and punishment factors, the severity of a mandatory life sentence in this case is excessive because it does not, insofar as the present offender at least, make the severity of such life sentence depend upon a rational gradation

of the offender's culpability, which is here that of a petty one-time offender rather than that of a commercial distributor as a consistent course of conduct or one who distributed large quantities for the market.

IV.

Until now, the writer has discussed the criteria of the excessiveness of the present life sentence in terms of its unconstitutionality as "cruel and unusual" punishment prohibited by the Eighth Amendment to the United States Constitution. All the more so does this life sentence, under present circumstances, violate the explicit prohibition of our own state constitution against not only "cruel" or "unusual" punishment, but also against "excessive" punishment. Article 1, Section 20, Louisiana Constitution of 1974.

This additional language in our new

state constitution deliberately added a new dimension of judicial review as to the excessiveness of sentences, whether imposed by the legislature or by judges. See summary of constitutional history of the provision and of the authoritative commentary concerning it in State v. Williams, 340 So.2d 1382, 1384 (La.1976) (concurring opinion).

As there noted, the provision was designed to give the courts the power to determine that sentences-"though not cruel or unusual, are too severe as punishment for certain conduct and thus unconstitutional." 340 So.2d 1385. One commentator noted "Mandatory penalties are particularly suspect because they frequently have no relation to the magnitude of the offense." 340 So.2d 1385.

In this regard, the general principles for sentencing statutes set forth by the

authoritative American Bar Association Standards of Criminal Justice are illuminating. Standard 2.1, Sentencing Alternatives and Procedures, outlines the following general principles which should be applicable:

"(a) All crimes should be classified for the purpose of sentencing into categories which reflect substantial differences in gravity. The categories should be very few in number. Each should specify the sentencing alternatives available for offenses which fall within it. The penal codes of each jurisdiction should be revised where necessary to accomplish this result.

"(b) The sentencing court should be provided in all cases with a wide range of alternatives, with gradations of supervisory, supportive and custodial facilities at its disposal so as to permit a sentence appropriate for each individual case.

"(c) The legislature should not specify a mandatory sentence for any sentencing category or for any particular offense.

"(d) It should be recognized that in many instances in this country the prison sentences which are not authorized, and sometimes required, are significantly higher than are needed in the vast majority of cases in order adequately to protect the interests of the public. Sentences of twenty-five years or longer should be reserved for particularly serious offenses or, under the circumstances set forth in sections 2.5(b) and 3.1(c) (special term), for certain particularly dangerous offenders. For most offenses, on the other hand, the maximum authorized prison term ought not to exceed ten years except in unusual cases and normally should not exceed five years."

Measured by this or almost any other standard now available, the life imprison-

ment mandatorily imposed for this drug offense under these circumstances is clearly excessive.

V.

I would therefore, on the present showing, set aside the present life sentence as unconstitutionally excessive. Upon sentencing hearing upon the remand (see footnote 5), however, it may be shown that the offender is a commercial distributor of heroin in large quantities (rather than the present being, as it seems on the present record, an isolated transaction by him, involving a relatively small quantity).

In the absense of such showing, the present mandatory life sentence is unconstitutionally excessive insofar as the present offender, and I would order the offender then to be resentenced under the graduated penalties permissible for the

next lesser included crime at the time of this 1976 offense, cf. State v. Craig, 340 So.2d 191 (La.1976)--i.e., attempted distribution, La.R.S. 14:27D(1) (1975), which provides for imprisonment at hard labor "for not more than fifty years." The trial court would thus be permitted to impose a substantial penalty for this serious crime, but one which would not be unconstitutionally excessive as grossly disproportionate to the circumstances of the present offense.

1. As amended by act 207 of 1973, La.R.S. 40:966 B(1) provided for mandatory life sentence upon conviction of the offense. After the offense the statute was again amended by Act 631 of 1977 so to provide a mandatory penalty, upon conviction, of "life imprisonment at hard labor, without benefit of probation, or suspension of sentence."
2. The same court which invalidated the mandatory life sentence in Hart, as excessive because grossly disproportionate to the underlying offenses there, maintained the life sentence when the underlying offenses involved the potentiality of violence and danger to life. Griffin v. Warden, West Virginia, etc., 517 F.2d 756 (C.A.4, 1975).
3. The decision was vacated and remanded for reconsideration in the light of an amendment to the state statute involved. Perini v. Downey, 423 U.S. 993, 96 S.Ct. 419, 46 L.Ed.2d 367 (1975).
4. In holding the life sentence unconstitutionally excessive for the minor drug offenders involved, the district court had discounted as irrelevant this probability and had judged the excessiveness on the basis of the maximum (i.e., life) sentence possible under the judgment of the court imposing

the legislatively mandated sentence. Carmona v. Ward, 436 F.Supp. 1153, 1165 (U.S.D.C., S.D., N.Y., 1977). In analyzing the drug violation statutes of the other American states, the court found that, aside from New York, only Louisiana retains a mandatory life sentence for certain narcotic sentences. 436 F.Supp. 1166-67. The life sentences permitted in six other states, see Carmona at 576 F.2d 424 (dissent), permit the sentencing judge to impose sentence on the basis of a rational gradation of culpability in determining the punishment mandated for the crimes involved.

5. There was no sentencing hearing or post-conviction evidentiary hearing on the issue of proportionality. Before this life sentence is set aside, an evidentiary hearing might be required, in the event undisclosed sentencing factors would negate the present apparent lack of proportionality of the sentence to the crime and to the present offender.

MAY 26 1979

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

No. 78-1397

ALVIN F. MALLERY, JR.,

Petitioner,

versus

**FRANK BLACKBURN, Warden,
Louisiana State Penitentiary,**

Respondent.

**RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF LOUISIANA**

**HARRY F. CONNICK,
DISTRICT ATTORNEY OF
ORLEANS PARISH**

**LOUISE KORNS,
ASSISTANT DISTRICT ATTORNEY
OF ORLEANS PARISH**

**Office of the District Attorney
Criminal Courts Building
2700 Tulane Avenue
New Orleans, Louisiana 70119
Tel: (504) 822-2414**

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No. 78-1397

ALVIN F. MALLERY, JR.,
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Respondent.

RESPONSE TO PETITION FOR WRIT
OF CERTIORARI TO THE SUPREME
COURT OF LOUISIANA

MAY IT PLEASE THE COURT:

The facts set out in Mallery's petition for certiorari are the same as those the accused himself, without corroboration of any kind, testified to on the witness stand at his trial and are opposed to the facts described by the State of Louisiana's witnesses. In this connection it is relevant to note that no plea of entrapment was ever

filed in this case, and that the jury, after listening to Mallery's claim that he had only wanted to help a suffering friend, brought in a verdict of guilty of distribution of heroin.

State v. Terrebonne, 364 So.2d 1290 (La. 1978), and *State v. Sykes*, 364 So.2d 1293 (La. 1978), referred to in Mallery's petition, see p. 13, involve the same issue as that posed by Mallery's own case, that is, the constitutionality of the mandatory life sentence imposed for sale of heroin by La. R.S. 40:966 B; and all three cases were handed down the same day — November 13, 1978.*

State v. Alvin Mallery and *State v. Carl Sykes*, supra, were both Orleans Parish cases. The State of Louisiana, acting through the Orleans Parish District Attorney, on October 20, 1978, filed with the Louisiana Supreme Court in *Sykes*, then pending on rehearing, and as applicable to *Mallery* and *Terrebonne* also, a certified statement from the Honorable Edwin A. Lombard, Clerk of the Orleans Parish Criminal District Court, showing the number of indictments for the sale of heroin, or possession with intent to distribute heroin, for the years 1975, 1976, 1977, and 1978 (to date). This exhibit, State's Exhibit 3, is an official compilation by the Clerk of Court for the Criminal District Court for the Parish of Orleans of the official court records for all

* A rehearing had been granted in *Sykes*, originally handed down June 19, 1978, on the question of the constitutionality of the mandatory life sentence. See per curiam, 364 So.2d, at 1299.

indictments for sale of heroin, or possession with intent to distribute heroin, as verified by the Clerk of the Criminal District Court for Orleans Parish.

The District Attorney for Orleans Parish believed that these figures were essential for the Louisiana Supreme Court to make an accurate determination of the unquestionable deterrent effect of the mandatory life sentence for the sale of, or possession with intent to distribute, heroin. See La. R.S. 40:966 B. These statistics are an official compilation of official court records and are uncontroverted by any evidence produced by the defense in the *Mallery*, *Sykes*, and *Terrebonne* cases in the Louisiana courts. A certified copy of State's Exhibit 3 is attached hereto.

The Orleans Parish District Attorney also filed in evidence in the Louisiana Supreme Court in the *Sykes* case a newspaper account of a statement by Peter B. Bensinger, administrator of the United States Drug Enforcement Administration, to the effect that because of severe sentences given for drug violations in Louisiana, New Orleans is not a major heroin center. *New Orleans States-Item*, December 12, 1977. A certified copy of State's Exhibit 4, which shows this newspaper account, is also attached hereto.

It must be borne in mind that in those cases in which it might be felt that a life sentence for sale of heroin is unduly harsh, recourse can always be had to the Louisiana Pardon Board, or a commutation of sentence can be sought from the Governor of Louisiana.

It is common knowledge that for punishment to be effective, it must be sure.

In the petition for certiorari herein it is argued that:

"Mallery is indistinguishable from a professional, profiteering distributor of heroin. He is indistinguishable from a career criminal who has been convicted of violating the law on previous occasions. He is indistinguishable from one who acted, not out of sympathy or need, but out of contempt and greed." P. 8.

The State of Louisiana's answer to this contention, if true, is that in order to effectively combat the sale of heroin, motive and similar considerations must be immaterial; it must become known throughout the community that whoever is found guilty of selling this noxious drug will spend the remainder of his life in prison. Stern measures are needed to overcome, or at least to hold at bay, great evils.

CONCLUSION

The State of Louisiana respectfully asks this Honorable Court to deny Alvin Mallery's petition for certiorari, which seeks to invalidate Louisiana's mandatory life sentence for the sale of heroin, and to affirm his conviction and life sentence.

HARRY F. CONNICK,
DISTRICT ATTORNEY OF
ORLEANS PARISH

LOUISE KORNS,
ASSISTANT DISTRICT
ATTORNEY OF
ORLEANS PARISH

Office of the District
Attorney
Criminal Courts Building
2700 Tulane Avenue
New Orleans, LA 70119
Tel: (504) 822-2414

CERTIFICATE

I certify that copies of this Response have been mailed, air mail, postage prepaid, to:

Paul A. Bonin, Esq.
Leonard L. Levenson, Esq.
John J. Lee, Jr., Esq.
International Trade Mart
Number 2 Canal Street
New Orleans, Louisiana 70130
Attorneys for Petitioner

Mattery v. Blackburn
U.S. Supreme Court No 78-1397



STATE'S EXHIBIT 3

CRIMINAL DISTRICT COURT
PARISH OF ORLEANS
OFFICE OF THE CLERK OF COURT
EDWIN A. LOMBARD, CLERK
EX-OFFICIO CUSTODIAN OF VOTING MACHINES

2700 TULANE AVENUE
NEW ORLEANS, LA. 70119
504/586-3061

October 17, 1978

Honorable Harry F. Connick
Orleans Parish District Attorney
2700 Tulane Avenue
New Orleans, Louisiana 70119

Dear Mr. Connick:

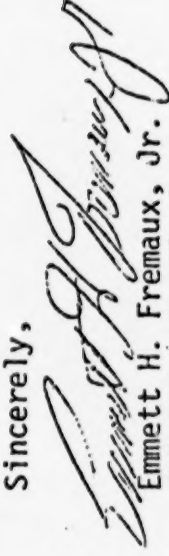
Pursuant to your request, I am writing to provide certification of the following information based upon official records of the Clerk's Office of Criminal District Court.

Indictments returned by the Orleans Parish Grand Jury and filed in the Clerk's Office for violation of R.S. 40:966(A), Sale of Heroine or Possession with Intent to Distribute, number by year as follows:

	<u>1975</u>	<u>1976</u>	<u>1977</u>	<u>1978 (To Date)</u>
NO. CASES	121	78	26	9
NO. DEFENDANTS	201	108	36	17

Attached please find a monthly breakdown of the above totals as per request.

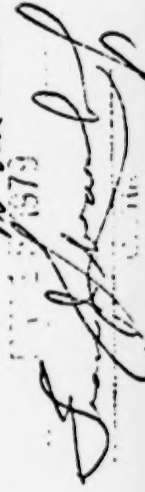
Sincerely,


Emmett H. Fremaux, Jr.
Chief Deputy Clerk

EHF/gjb

Enclosure

STATE'S EXHIBIT 3

SEARCHED INDEXED
SERIALIZED FILED
OCT 19 1978
FBI - NEW ORLEANS
IN our records.


Mattley v. Butler
U.S. Supreme Court
No 78-1397

STATE'S EXHIBIT 3

ORLEANS PARISH GRAND JURY
INDICTMENTS filed with the CLERK OF CRIMINAL DISTRICT
COURT for Violations of R.S. 40:966(A)

1975 - 1978

DATE: OCTOBER 17, 1978

		<u>1975</u>	<u>1976</u>	<u>1977</u>	<u>1978</u>
JANUARY					
Total # cases		11	15	6	0
Total # defendants		21	21	7	0
FEBRUARY					
Total # cases		1	9	0	1
Total # defendants		2	12	0	2
MARCH					
Total # cases		5	2	2	3
Total # defendants		5	2	3	5
APRIL					
Total # cases		8	8	0	0
Total # defendants		14	15	0	0
MAY					
Total # cases		5	2	5	2
Total # defendants		6	4	6	6
JUNE					
Total # cases		15	4	6	1
Total # defendants		24	5	12	1
JULY					
Total # cases		6	8	3	1
Total # defendants		7	9	4	2
AUGUST					
Total # cases		3	8	1	1
Total # defendants		5	9	1	1
SEPTEMBER					
Total # cases		48	5	2	0
Total # defendants		86	6	2	0
OCTOBER					
Total # cases		5	10	0	0
Total # defendants		11	17	0	0
NOVEMBER					
Total # cases		3	4	1	
Total # defendants		4	5	1	
DECEMBER					
Total # cases		11	3	0	
Total # defendants		16	3	0	
TOTAL # CASES		121	78	26	9
TOTAL # DEFENDANTS		201	108	36	17

STATE'S EXHIBIT 3

appears in our records.

Franklin

of what

Ward's (copy) October 1978

A TRUE COPY

Ward
Clerk of Criminal District Court

Matter of Blackburn
U.S. Supreme Court
No. 78-1397

Tough sentences cutting drug action

By MARJORIE ROEHL
LH/c 5/12/77

Because of the severe sentences given for drug violations in Louisiana, New Orleans is not a major heroin center, says Peter B. Bensinger, administrator of the U.S. Drug Enforcement Administration.

"Drug traffic in heroin may call for a life sentence now," Bensinger said yesterday. "That's important. Nationally, one third of those convicted for drug violations are sentenced to three years or less. One of three narcotics violators is only put on probation. If the violator is out of jail before the court papers are dry, that's a big problem." He also praised Louisiana and local enforcement efforts.

Bensinger was here for the 28th session of the Franco-American-Canadian Intergovernmental Committee on Narcotic Control, which met at the Hilton Hotel.

This committee developed the strategy and coordinated operations to break the "French connection" that had supplied the bulk of heroin to North America before 1972. Since 1974, no heroin from France has been seized in the U.S.

The Drug Enforcement Administration considers heroin the most dangerous drug in common abuse today. However, its use seems to have stabilized, Bensinger said. "Deaths among users are down 30 percent. In the past three months, 90 people a month have died — a real decrease from 15 months ago when the average was 140 to 150 a month."

In 1977, six tons of heroin entered the United States — down by a ton to a ton and a half. Also, the heroin purity table is at its lowest in years, which means it has to be cut more often with other substances.

He called the job of the drug undercover agent "the most dangerous, difficult and complex in the criminal justice system. In the past four years, four agents have been killed in the line of

duty. That is because the profits are so great. A kilo, or 2.2 pounds of heroin, is worth more than \$1.5 million."

The department is now giving more attention to the Gulf Coast from Galveston to Mobile, Bensinger said, because the area is ideal for smugglers. "There are so many bayous into the marshes and the New Orleans is one point for transshipment of drugs to other places. But drug dealers are beginning to divert their deliveries to as far away as Maine," he said.

HE HAD WORDS of praise for the Mexican government, saying it has destroyed 35,000 fields of poppies. He said Southeast Asia is still a problem source, however.

While cocaine is growing in popularity, Bensinger said, "CP, a hallucinogenic that is easy to manufacture and is legitimately used to tranquilize animals, is the latest development on the drug scene. It has the unpredictable qualities of LSD, which it is replacing, and the DEA is seeking tighter controls on its use, he said.

Maurice Bouvier, central director of the French Judicial Police, said his country is more concerned now with armed robberies than with drugs, although we still keep an attentive eye on the Marseilles region."

J. Paul Drapeau, deputy commissioner of criminal operations for the Royal Canadian Mounted Police, said he believes drug abuse in Canada may be on the wane. "However, dangerous chemical drugs are being manufactured in Canada and taken across your border. This year, we found 20 PCP laboratories," he said.

During the meeting, Bensinger said, the "profile" and "method of operation" of drug couriers were discussed. "Some do fit a pattern," he admitted. "For instance, if someone buys a ticket from New Orleans to San Diego, pays cash and only stays out there an hour, we may presume he did not go to do an interview with the media."

News is our friend.

Frank J. Howard